

ANDREAS BLECKMANN ET AL.
USSN 09/719,670

CONDITIONAL PETITION FOR EXTENSION OF TIME

If entry and consideration of the amendments above requires an extension of time, Applicants respectfully request that this be considered a petition therefor. The Commissioner is authorized to charge any fee(s) due in this connection to Deposit Account No. 14-1263.

ADDITIONAL FEE

Please charge any insufficiency of fees, or credit any excess, to Deposit Account No. 14-1263.

REMARKS

Applicants respectfully request reconsideration and allowance of this application in view of the amendments above and the following comments.

Claims 5-14 are pending. The currently pending claims are attached on separate sheets. It is believed that no new matter has been added.

Rejections under 35 U.S.C. 103

Claims 5-9, 11, 12 and 14 are rejected under 35 U.S.C. 103(a) as being obvious over Ansmann et al. (U.S. Patent No. 5,863,461) in view of Klier et al. (U.S. Patent No. 5,597,792).

Claim 10 is rejected by the Examiner as being obvious over Ansmann in view of Klier and Diec et

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al. (WO 98/17238).

In response to *both* obviousness rejections, Applicants respectfully submit that a *prima facie* case of obviousness has not been made out. Therefore, Applicants respectfully request that the Examiner reconsider and withdraw both rejections.

Specifically, the examiner considered the applicants' previous arguments and upon reconsideration of the references and concluded at the top of page 4 of the Official Action: "Thus the Examiner doesn't agree with applicants' assertion that emulsions and microemulsions are fundamentally different systems." The applicants' respectfully disagree with the examiner's conclusion on two counts.

First, it is well known by those of ordinary skill in the art that emulsions and microemulsion are fundamentally different systems. Attached to this response is a copy of course material from the American Chemical Society short course "Surfactants, Micelles, Liposomes and Liquid Crystals in **Emulsions and Microemulsions**". See in particular pages 19 and 20 – it can be seen that emulsions and microemulsion have at least four distinct differences: (1) Appearance; (2) Droplet size; (3) Thermodynamic Stability; (4) Means of Formation.

Second, the Klier et al. reference teaches an emulsion which is unstable upon standing; Klier et al. explains that upon standing the "emulsion" of their invention will form two separate phases, one of which is

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the microemulsion previously described in their invention (i.e. not only does the Klier et al. emulsion require energy for formation, the emulsion requires continuous energy to maintain the emulsion in this form).

Applicants further point out Diec does not supplement the teachings of Klier and Ansmann in this respect, since Diec is only being used to suggest a surfactant or emulsifier. Accordingly, Klier et al. fundamentally differs from the Ansmann et al. reference and as such one of ordinary skill in the art would not look to the teachings of Klier et al. to teach or suggest lowering the viscosity of the Ansmann et al. emulsions.

Rejections under 35 U.S.C. 101

The Examiner rejected claim 5-14 under 35 U.S.C. 101 as claiming the same invention of Application Serial No. 09/719,365. In response, Applicants point to MPEP 804 II.A. ("Statutory Double Patenting") which states:

"Same invention means identical invention'...A reliable test for double patenting under 35 U.S.C. 101 is whether a claim in the application could be literally infringed without literally infringing a corresponding claim in the patent...Is there an embodiment of the invention that falls within the scope of one claim, but not the other? If there is such an embodiment, then identical subject matter is not defined by both claims and statutory double patenting does not exist."

Applicants reiterate that the rejection is in error, because the claims of the two applications are not co-

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extensive in scope. In the instant claims, the content of lipids, emulsifiers and lipophilic constituents is "at least 15% by weight." In the co-pending the application, it is "at most 15% by weight." Accordingly, the claims are not coextensive, and there is no "same invention-type" double patenting.

In view of the foregoing, Applicants submit that the Examiner would be fully justified to reconsider and to withdraw this rejection. An early notice that this rejection has been reconsidered and withdrawn is, therefore, earnestly solicited.

Conclusion

Applicants believe that the foregoing constitutes a bona fide response to all outstanding objections and rejections.


Applicants also believe that this application is in condition for immediate allowance. However, should any issue(s) of a minor nature remain, the Examiner is respectfully requested to telephone the undersigned at telephone number (212) 808-0700 so that the issue(s) might be promptly resolved.

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Early and favorable action is earnestly solicited.

Respectfully submitted,

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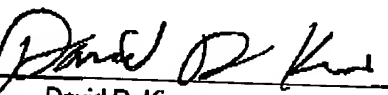
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Enclosure: Copy of selected pages from American Chemical Society (ACS) short course

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that the foregoing Request for Reconsideration under 37 CFR § 1.111, the attached Pending Claims, and the selected pages from the American Chemical Society short course (12 pages total) are being facsimile transmitted to the United States Patent and Trademark Office on the date indicated below:

Date: May 27, 2003

By 
David D. Kim